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Nos. 1320-1321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation,
Plaintiff in Error,
vs.
WILLIAM FINNEY, late Sheriff of Blaine County, Idaho,
Defendant in Error.
} No. 1320.

AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation,
Plaintiff in Error,
vs.
J. C. MILLS, Jr., late Sheriff of Boise County, Idaho,
Defendant in Error.
} No. 1321.

POINTS OF PLAINTIFF IN ERROR.

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By ..... Deputy Clerk.

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POINTS OF PLAINTIFF IN ERROR.

STATEMENT.

Both of these cases come before this Court upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division. They

involve precisely the same questions of law and fact, and therefore (the permission of this Court having been first obtained) the points involved are presented in only one Brief. References will be made only to the Transcript in the Finney case (No. 1320), for the sake of brevity.

Each of the actions was brought by a Sheriff upon a bond of indemnity given to him by the Plaintiff in Error as surety, and copy of which bond is annexed to the complaint (pg. 21). The bond was demanded by the Sheriff upon the foreclosure of a chattel mortgage held by the principal of said bond, the Flato Commission Company, and ran directly in favor of the Defendant in Error as Sheriff. The bond recited that, "Whereas un- " der and by virtue of an affidavit on the foreclos- " ure of a chattel mortgage given by one R. L. Shaw " to the above named Flato Commission Company, " and the notice required by the Statutes of Idaho " for the foreclosure of chattel mortgages, directed " and delivered to the said William Finney, Sheriff " of Blaine County, the said Sheriff was directed " to take into his possession the said mortgaged " property, and to sell the same, and the said " Sheriff did thereupon take into his possession the " following described property, to wit: (describing " the same); and whereas upon the taking of said " sheep, other persons or person claimed the said " property as their own; and whereas the said " Flato Commission Company, notwithstanding said " claim, requires the said William Finney, Sheriff,

" that he shall retain said property in his posses-
" sion, and sell the same"; and thereupon follows the condition of the bond.

In the complaint (pg. 16), it is stated that, "On
" or about the 24th day of July, 1902, the above
" named plaintiff, as Sheriff of Blaine County, at
" the instance and request of the above named de-
" fendant, the Flato Commission Company, and
" upon affidavit and notice *duly filed as required by*
" *the Statutes of the State of Idaho* relative to the
" foreclosure of a chattel mortgage, took posses-
" sion of certain personal property (describing the
" same) * * * ; that *after* the said plaintiff
" had taken possession of said sheep at the instance
" and request of the Flato Commission Company,
" the said sheep and all of them were claimed by
" Ralph Cowden as his separate and individual
" property. That in order that the said plaintiff
" might hold said sheep, retain possession of the
" same, and make sale thereof, to satisfy the mort-
" gage of the Flato Commission Company under
" which the same had been taken, and *upon demand*
" and at the request of this plaintiff, the said Flato
" Commission Company and the said American
" Bonding Company of Baltimore made and exe-
" cuted and delivered to the plaintiff, their certain
" bond of indemnity; * * * that upon the execu-
" tion and delivery of said bond of indemnity *and*
" *in consideration of giving the same,* the said
" plaintiff retained possession of said sheep, and
" sold the same at the instance and request, and

" under the authority and advice of, the said Flato " Commission Company and the American Bonding " Company."

It is then alleged that judgment was obtained by said Cowden against the Defendant in Error, *"and " that said judgment remains unsatisfied and un- " paid".*

To this Complaint the Plaintiff in Error demurred (pg. 93), upon the ground that it did not state facts sufficient to constitute a cause of action. Said demurrer was overruled (pg. 96), and such overruling is assigned as error (pg. 1). Upon the trial of the action, Plaintiff in Error objected to the introduction of any evidence, for the reason that the complaint failed to state facts sufficient to constitute a cause of action (pg. 173).

It is contended by Plaintiff in Error that the judgment should be reversed, upon the ground that the demurrer to the complaint should have been sustained.

First, because the bond exacted *colore officii,* was in violation of the Idaho Statute requiring the Sheriff to proceed upon the mere notice and affidavit and without bond, was therefore given under duress, was without consideration, and void.

Secondly, that the bond having been exacted and given as one of indemnity, and containing no covenant to pay in the event that the plaintiff incurred liability, the Sheriff in default of an allegation that he had paid the judgment, had brought the action prematurely.

I.

POINTS.

The Bond Sued Upon Was Exacted Colore Officii, and Was Therefore Void Ab Initio.

The Revised Statutes of Idaho (Sec. 1871) provide under the title, "Duties of Sheriffs", that "The "Sheriff * * * *must* serve all process and "notices in the manner prescribed by law."

The same Statutes, Sec. 1882, provide that, "A "Sheriff or other ministerial officer is justified in "the execution of, and *must* execute all process "and orders regular on their face and issued by "competent authority, whatever may be the defect "in the proceedings upon which they are issued."

The same Statutes in the following sections indicate the scheme provided for the protection of the Sheriff. In the Chapter of the Code of Civil Procedure, Sec. 3540, treating of executions, it is enacted that if the Sheriff levies an execution upon property which is thereafter claimed by third persons, he may summon a Sheriff's jury to try the validity of the claim. Only in the case that the jury finds for the claimant, may the Sheriff demand a bond of indemnity, and if the bond be not given, he may release his levy. (Revised Stats., Sec. 4478.)

In the Chapter on Attachments (Sec. 3306) (Revised Stats., Sec. 4314), it is provided that the Sheriff may similarly protect himself by trial of Sheriff's jury.

In the Chapter relating to Claim and Delivery (Sec. 3281) (Revised Stats., Sec. 4281), it is provided that,

> "If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto or right to possession thereof, * * * and serve the same upon the Sheriff, the Sheriff is not bound to keep the property or deliver it to the plaintiff unless the plaintiff on demand indemnify the Sheriff against such claim."

In the Chapter (Sec. 2830) relating to Chattel Mortgages, it is provided that,

> "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court *by any person interested* in so doing, *for which purpose an injunction may issue if necessary.*"
>
> Revised Stats., Sec. 3396.

And again (Sec. 2824),

> "Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as hereinafter provided, or it may be foreclosed by action in the District Court having jurisdiction in the County in which the property is situated."

By Sec. 2827 it is provided that when this affidavit and notice are placed in the hands of the Sheriff,

> "the officer *must* take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in cases of sale of like property on

execution, and the same *must* be conducted in the same manner."

Revised Stats., Sec. 3393.

By Sec. 2829 (Revised Stats., Sec. 3395), it is provided that,

"The officer must make return upon the affidavit hereinbefore mentioned, of all his proceedings, and must transmit the same * * * to the Clerk of the District Court * * * and the Clerk must file such return in his office."

We, therefore, have here a complete statutory scheme for the foreclosure of chattel mortgages in Idaho, which scheme has been declared by the Courts of that State as exclusive.

Rein v. Calloway, 7 Ida. 633; 65 Pac. Rep. 63.

Any mortgagee may require the proper Sheriff to sell the mortgaged property, by furnishing the affidavit and notice mentioned in the Revised Statutes (Sec. 3391); and thereupon

"The officer *must* take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in cases of sale of like property on execution, and the same *must* be conducted in the same manner".

The Complaint states expressly that the Sheriff took possession of the mortgaged property "upon " affidavit and notice *duly filed, as required by the " Statutes of the State of Idaho* relative to the " foreclosure of a chattel mortgage"; that there-

after upon claim being made to the property by a third person, "upon demand of the plaintiff" the bond sued upon was furnished. The bond itself recites that the affidavit and notice required by the Statutes of Idaho were furnished.

These provisions of the Statute have been definitely construed by the Supreme Court of Idaho in

> Blumauer etc. Co. v. Branstetter, 43 Pac. Rep. 575.

In that case the affidavit and notice having been served upon the Sheriff, and the goods having been levied upon but not yet sold, the goods were attached, and the Sheriff having proceeded with the sale under the mortgage, was held liable by the trial Court to the attaching creditor. The Supreme Court, in reversing the judgment, said:

> "It is apparent that the affidavit and notice are as effectual in the sale of property mortgaged and in the collection of the debt, in every respect as an execution. * * * Where these papers are placed in the hands of the Sheriff, and they are fair upon their face, he must proceed to execute them in the manner pointed out in the Statute. *The law requires it, and the Sheriff has no alternative.* It is in fact and in law, a writ of execution in its proceeding, and for a neglect or refusal to execute which he would be liable to the creditors, as pointed out in Sec. 1875, Revised Stats. And the converse is true. It is process in the execution of which the Sheriff is protected. * * We must not lose sight of the fact that process fair upon its face must be executed by the Sheriff upon its being placed in his hands. We hold the affidavit and notice to be process.

> No objection is made by the respondent to the form of the process. Therefore, the Sheriff must execute it. The Sheriff cannot be called upon when he receives an execution, to sit in judgment upon the validity of the judgment. Neither can he in this case be called upon to sit in judgment on the validity of the mortgage. * * But the attaching creditor is not without abundant and easy remedy. Section 3396 is: 'The right of the mortgagee to foreclose as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary.'"

The remedy for the mortgagor or "any person interested in so doing", in the case of an attempted abuse of the process of the Court, is pointed out by the Statute. The sale must be arrested by an injunction. The demand of the bond was in direct violation of the Statute, which says that when the affidavit and notice are placed in the hands of the Sheriff, he *must* take the property into his possession, and *must* give notice of the sale, and *must* conduct the same in the same manner as is provided for sales on execution. To give this language its broadest meaning, would be to say that he shall have the same right as in the case of sales on execution, viz., where claim is made by third persons, to summon a Sheriff's jury, and if the claim is sustained by that jury, to demand a bond of indemnity as a condition of proceeding with the sale.

The notice and affidavit were regular on their face. The complaint itself so states: "Duly filed

as required by the Statutes". The bond could not then be lawfully "demanded". The Sheriff was bound without it to proceed to sale, unless enjoined. As said by the Supreme Court:

> "The law requires it and the Sheriff has no alternative".

It is expressly provided in the Statute, that in execution and attachment cases, the Sheriff may protect himself against the claims of third persons, by Sheriff's jury; in replevin cases, by bond of indemnity. Industriously, however, the Statute withholds said rights in the foreclosure of chattel mortgages, "The Sheriff has no alternative".

AUTHORITIES.

It is undoubtedly true that some cases are to be found in the books of bonds voluntarily given, and not contravening any express Statute, which have been enforced, although not expressly authorized. But in these cases there is no element of extortion by color of office, and they are not bonds running in favor of public officers, but generally bonds given by public officers for the faithful performance of their official duties; an exception, in other words, grafted upon the law for the benefit of the public as a whole. It will be found that in none of these excepted cases were the bonds required by an officer as a condition of performing duties to the public which by law he was required to perform without exacting the bond.

The cases representing the general rule contended for may be subdivided into the following classes:

(a) Bonds not required by law, but *voluntarily* given to indemnify the official.

(b) Bonds which by their terms were more onerous than the Statute or the order of Court.

(c) Bonds *demanded* by an official without authority of law.

(d) Bonds voluntarily given pursuant to unconstitutional Statute.

(a) *Voluntary bonds, for which there is no express legal authority.*

U. S. v. Hudson, 65 Fed. Rep., page 68.

Where no Statute of the United States is broad enough to authorize bail after conviction, a bond given even pursuant to the rule of the United States Supreme Court is void, and is not binding on either principal or sureties.

Parker, Judge:

> "The question is further put whether or not a bond taken under such circumstances would not be good anyhow. Most certainly not. The authorities are uniform on that subject. Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer'. U. S. v. Goldstein's Sureties, 1 Dill. 413, Fed. Cas. No. 15,226. In U. S. v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393, Judge Dillon says: 'It is settled that bonds are valid only when taken in pursuance of law and the

order of a competent court.' It is said by the Court in the case of State v. Buffum, 2 Fost. (N. H.) 267, when speaking of the liability of sureties on bail bonds: 'They are liable in any case only upon the ground that they enter into a recognizance ordered by a tribunal having authority to act in the premises'. 'It is the essence of authority understood by the bail or surety of another that there should have been a valid obligation comprehended.' U. S. v. Hand, 6 McLean, 274, Fed. Cas. No. 15,296. 'Bail taken by a court without jurisdiction, or by an officer without authority is void'. State v. Wininger, 81 Ind. 51; Dickinson v. State (Neb.), 29 N. W. 184; State v. Jones, 3 La. Ann. 10; Gray v. State, 43 Ala. 41; Jacquemine v. State, 48 Miss. 280; Branham v. Com., 2 Bush. 3; Com. v. Roberts, 1 Duv. 199; Com. v. Fisher, 2 Duv. 376; Dugan v. Com., 6 Bush. 305; Harris v. Simpson, 14 Am. Dec. 101; State v. McCoy, 1 Baxt. 111; Wallenweber v. Com., 3 Bush. 68; Williams v. Shelby, 2 Or. 144; Schneider v. Com., 3 Metc. (Ky.) 409; Blevins v. State, 31 Ark. 53; Cooper v. State, 23 Ark. 278; State v. Nelson, 28 Mo. 13; State v. Hays, 4 La. Ann. 59; State v. Vion, 12 La. Ann. 688; Holmes v. State, 44 Tex. 631; State v. Berry, 8 Me. 179; State v. Russell, 24 Tex. 505; Com. v. Loveridge, 11 Mass. 33; Com. v. Otis, 16 Mass. 198; Com. v. Canada, 13 Pick. 86; Powell v. State, 15 Ohio, 579; State v. Clark, 15 Ohio, 595; People v. McKinney, 9 Mich. 444; Then I take it, if I approve the bail bond in this case, it is one which is necessarily invalid, because ordered to be taken without authority. But we hear it said that bail may be taken under the circumstances of this case in the interest of liberty. Nothing is in the interest of liberty that is unauthorized by law".

State v. Murphy, 48 Pac. Rep. (Nev.), page 628.

Where the release of defendant under bail before he has pleaded is unauthorized the bond executed in such case is invalid.

> "It is well settled that bail taken in criminal actions to be valid, must be authorized by law. Dickenson v. State, 20 Neb. 72, 29 N. W. 184; Powell v. State, 15 Ohio St. 579; State v. Clark, Id. 595; Williams v. Shelby, 2 Or. 144; State v. Winninger, 81 Ind. 53; Harris v. Simpson, 14 Am. Dec. 101."

State v. Lagoni, 76 Pac. Rep. (Mont.), 1044.

Though a defendant is released on bail, if the bond was not lawfully required, it cannot be enforced. In this case the Court was without jurisdiction to hold the accused to answer.

County v. Clark, 13 Pac. Rep. (Or.), 511.

A county court *has no authority under the act* regulating proceedings to open roads to require a bond of a petitioner for costs and damages that may be awarded against him in the proceedings, and if exacted it cannot be enforced.

State v. Husey, 9 N. W. Rep. (Ia.), 327.

The warden of the penitentiary *not being required by statute* to give a bond, a bond given by him to the State cannot be enforced. It was claimed that the bond was a valid obligation at common law.

> "In the present case, Husey received nothing by reason of the execution of the bond. No benefit or advantage was conferred on him because of its execution. It must, therefore, be

regarded as having been *voluntarily executed,* and as there was no consideration therefor it cannot be enforced."

Dugan v. Com., 69 Ky. 305.

A bail bond taken by a clerk who has no statutory authority to take it is void.

Blevins v. State, 31 Ark. 53.

Where a sheriff has no authority to make arrest outside of his own district, a bail bond taken from defendant is void.

State v. Balize, 38 La. Ann. 542.

An appearance bond taken by a sheriff without order of Court admitting defendant to bail is void.

Webber v. Blunt, 19 Wend. 188.

A promise to a sheriff to indemnify him against all damages to which he might be subjected, in consequence of discharging from custody a third person whom he has arrested on legal process is void, although he was induced to grant the discharge upon a false representation of the promisor that the debt, to secure payment of which the process had been issued, had been satisfied.

State v. Sandlin, 44 Ind. 504.

An execution plaintiff is under no obligation to give an indemnity bond to a constable; *he is bound to perform his duty* according to law without such bond.

In the case at bar, says the Idaho Statute, he *must* proceed with the sale.

Vose v. Dean, 7 Mass. 280.

Bail taken by a Court *without authority of law* is void.

Urquhart v. Carvin, 25 La. Ann. 218.

A bond given to a sheriff for release of property provisionally seized is void, nor can he recover for a breach thereof *as a conventional undertaking,* since he has no authority to take such obligation.

Meyer v. Johnson, 28 La. Ann. 244.

Since only a defendant in an attachment can release a property attached by giving bond, no action lies on a bond given by an intervener for a release of the property.

Collins v. Westbury, 2 Bay, 211.

Where to release goods that had been lawfully seized under writ of attachment, the bond sued on was executed, the plea demurred to having set forth that the bond was given at a time when defendant could not wait the slow process of law to obtain redress, the plea was held good on the ground that the bond was given under duress.

Perry v. Hensley, 14 B. Monr. 474.

Where levy is made on property exempt from execution, and a delivery bond is given for its release, the same cannot be enforced.

> "*Although the bond was entered into voluntarily,* yet the necessity for its execution was produced by an illegal act, and therefore its execution may with propriety be said to have been induced by legal coercion. Besides, as the property levied on was not subject to execution,

> the bond is not founded on any consideration either good or valuable. Its execution under the circumstances, cannot be regarded as an implied admission that the property was liable for the debt."

Caffrey v. Dudgeon, 38 Ind. 512.

Action on replevin bond given by defendants in an action brought by them in a court which did not have jurisdiction, but upon which they received the property, which they refused to return.

It was held that although defendants had invoked that jurisdiction, and received the property, the bond given could not be enforced, although, of course, voluntarily given.

Benedict v. Bray, 2 Cal. 251.

If a Justice issue an attachment and take bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. "A bond exacted by an officer when he has no authority to require it, is void. (Thompson v. Lockwood, 15 Johns. 256.)"

People v. Cabannes, 20 Cal. 525.

A Justice, on conviction, imposed a fine, and in default of same, imprisonment. To perfect an appeal, defendant gave a bond reciting the money judgment, and binding the sureties for its payment. The bond not having been authorized by Statute, its enforcement was refused.

> "In taking the bond, the Justice has exacted a security which the Statute does not require, and such being the case, we are of opinion that no liability resulted from its execution".

Powers v. Crane, 7 Pac. Rep. (Cal.) 135.

In this case it was held (one of the Justices of this Court writing the opinion) that, where an undertaking was given to stay execution, when as a matter of law execution had been stayed by an undertaking previously given, the later undertaking was without consideration and void.

> "As the statute itself wrought the stay, there was no consideration for the sureties' promise."

McCallion v. Hibernia Society, 33 Pac. Rep. (Cal.) 329.

In this case it was held that where a bond in addition to the ordinary appeal bond is given to stay judgment, it is void and no judgment can be entered thereon against the sureties.

(b) *Bonds whose terms are more onerous than the provisions applicable thereto.*

Com. v. Riffe, 49 S. W. Rep. (Ky.) 772.

The Court held that where the accused was required to execute a bond for a sum greater than that fixed in the order admitting him to bail, the bond was void, and cited Cooper v. Com., 13 Bush 654, to the same effect.

Lambert v. Haskell, 22 Pac. Rep. (Cal.) 327.

In this case it was held that to the extent that the injunction bond was broader than required by the statute, it was void.

> "Even if the undertaking had expressly provided for a subsequent liability, if such pro-

vision be outside of what is required by the statute, it would be void; for it is settled that a statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative."

Wooters v. Smith, 56 Tex. 198-209.

In this case it was said:

"A bond given as a condition to be permitted *to enjoy a right clearly given by law, demanded* by an officer who has property in his possession which he has seized under process, ought not to be said to be a voluntary bond, when more onerous than prescribed by statute."

Of course, the argument is stronger that the bond is not voluntary when no bond at all is required by statute.

The right to the sale on the notice and affidavit, admitted by the complaint to have been sufficient, was given by the statute, and the bond having been "demanded" (according to the complaint) it was extorted by color of office, was without consideration and void.

(c) *Bonds demanded by an official without express authority.*

Tully v. Cutler, 82 S. W. Rep. (I. Ty.) 714.

Under the statute providing for an attachment bond to protect the defendant or claimants of the attached property from damage, the sheriff has no right to demand any indemnity beyond the attachment bond as a condition of levying the attachment.

In fact, such bond was demanded and given, and the action was brought on the bond by the custodian, for his fees.

The Court said:

> "There is no provision for an indemnifying bond under the head of attachments in any way. The statute provides for an attachment bond which is ample to protect the defendant in the action against any damage he may suffer, or to protect claimants to the property attached. *If the affidavit be given, it becomes the duty of the sheriff to levy the same without delay,* and the statute further provides for the disposition of such attached property, and the sheriff would have no right to demand any indemnity whatever beyond the attachment bond for any person."

And this was held notwithstanding the provision in the statute that the sheriff, in addition to the bond, might require sufficient money to cover his fees.

U. S. v. Humason, Fed. Cas. 15,421.

Where an officer is required by his superior to give a bond with stipulations in any condition thereof *not required by statute,* the bond is void in toto.

Board v. Harvey, 52 Pac. Rep. (Okl.) 402.

Where the statutes do not either directly or by implication *require* an official to give bond, the bond when exacted is void, even though the board which exacted it is given supervisory control over the officer.

> "The following cases hold that a bond voluntarily given for the performance of official duty is valid though no statute requires the bond. * * * The following cases hold such official bond without consideration and void. * * * But there seems to be no difference of opinion upon the proposition that if the unrequired bond is extorted it is void. * * * We cannot assent to the argument that is made that a bond which is required by a board that has no supervision over the officer from whom it is required cannot be viewed as an exacted obligation, but should be considered as one voluntarily given, because the board had no jurisdiction to supervise the action of the officer, or to interfere with his taking possession of the office. A thing required by a body that had no jurisdiction to act in any manner could certainly be no less exacted than if required by a body that had jurisdiction to act, but acted in a manner different from that authorized by law. The claim, then, that the bond was voluntarily given can in no way be upheld, and the case must depend on *whether the law required* the giving of this bond."

It is not pretended that the Idaho statute either required or provided for the bond in issue. We contend, on the contrary, that the statute by implication, forbade the demanding of the bond.

Dunlap v. Vreret, 10 La. Ann. 83.

A sheriff, *though threatened with suit by one claiming property* seized at the instance of the plaintiff in execution, cannot exact from the latter a bond of indemnity.

State v. Koontz, 83 Mo. 323.

A constable cannot, on notice of a claim of *a third person* to property, demand of the plaintiff a bond of indemnity.

Mitchell v. Vance, 5 T. B. Monr. 528.

Property seized under execution and claimed by third person. Sheriff's jury called, but refused to render any verdict. Plaintiff therefore refused to make sale unless given bond of indemnity.

> "These facts prove unquestionably that in refusing to make sale of the property until the bond was executed, the plaintiff *acted in direct violation of the duties of his office.* The jury having failed to render a verdict as to the right of the property, the claimant of the property must necessarily have failed to establish his right, and the Act of Assembly upon that subject imperatively commands the officer by whom the property is executed, to sell the property whenever the claimant fails to establish the property to be his. *The bond must therefore have been* executed for the purpose of *inducing the plaintiff to do that which by the duties of his office was incumbent on him to do,* and as such we apprehend is not binding upon the defendants. * * * Whether or not the present bond would have formed an exception to the rule which makes void, promises to officers for the purpose of inducing them to perform their duty, if for selling the property the plaintiff had been liable to the claimant of the property, is a question not necessary now to be decided, and we shall, therefore, forbear to enter upon its discussion; for the Act of Assembly not only required the plaintiff after the claimant failed to establish the property to be his, to make sale thereof, but it moreover explicitly declares that for selling under such

circumstances, the officer shall not be liable to any suit on account of such sale."

The Supreme Court of Idaho, in the Blumauer case (*supra*) has said the same thing of this sheriff.

"It is process in the execution of which the sheriff is protected."

Servanti v. Lusk, 43 Cal. 238.

A sheriff on ascertaining that property which had been attached, was exempt, refused to release it without an undertaking. The same was held void for want of consideration, and for having been illegally exacted under color of office.

"In exacting the undertaking sued upon as a condition on which he would release the property from the attachment, the sheriff exceeded his authority, and violated his duty. So far as the undertaking was founded upon the release of the wagons, it was without consideration and void, inasmuch as *it was the duty of the sheriff* to release them without an undertaking."

Walker v. Fetzer, 34 S. W. Rep. (Ark.) 536.

Action against surety on bond exacted by a justice as a prerequisite for an enforcement of a statutory lien against a horse. The Court says:

"*The statute* * * * *nowhere provides* for the filing of a bond as a prerequisite for the enforcement of such lien. On the contrary, where the owner files with the justice a written statement, duly verified, setting forth the amount of his claim, his cause of action, and a description of the animal upon which he has a lien, it is the duty of the justice to issue an order to the constable to take the animal and hold it sub-

ject to the order of the Court, without requiring the filing of a bond. The bond was unauthorized, without consideration, and void."

The only ground for the decision was the same one applicable here, that there was no statute requiring the bond.

(d) *Bonds voluntarily given without authority of law.*

Byers v. State, 20 Ind. 47.

Action on a statutory bond for support.

"The bond then, which was the foundation of the present suit, was required and taken by the magistrate *without authority of law,* because the statute authorizing it was unconstitutional, and so far void and not law, and further, the bond was, we may say, forbidden by the Constitution, the paramount law, and hence was taken not only without law, but in violation of law; and the question arises, can such a bond be enforced under any circumstances? We think not. Such a bond is without a valid consideration, and that fact is a bar to an action upon it. Indeed, it is the settled law of this State, that where a bond is taken by an officer or court *acting simply under statutory power,* the instrument taken must be *authorized* by the statute or it will be void, and in suing upon such instrument, the complaint must set out the facts showing that the bond was taken in a case where the law authorized it, and in many cases it must appear that it was taken exactly or substantially in accordance with the statutory power."

It is not enough, therefore, that the taking of the bond is not prohibited. The official being a creature

of the statute, his power (whether to "demand" a bond or otherwise) must be measured by the terms of the statute.

Shaughnessy v. American Co., 69 Pac. Rep. (Cal.) 250.

In this case the Court said:

> "It has been decided by this Court in bank, that so much of Section 1203, C. C. P., as exacts It follows, therefore, that the undertaking itself It follsws, therefore, that the undertaking itself is void, unless, as contended, it should be upheld as a voluntary common law obligation. We cannot perceive how the bond under consideration can be upheld upon this theory. * * * This bond was given to secure a statutory privilege upon conditions to its enjoyment imposed by the statute, but the privilege was a constitutional privilege, which could not be interfered with by statute. The undertaking was, therefore, wholly without consideration, and void."

The bond was one under the Mechanics' Lien Law, to provide protection to mechanics and materialmen.

The case was affirmed in bank in 71 Pac. Rep. (Cal.) 701.

S. F. L. Co. v. Bibb, 72 Pac. Rep. (Cal.) 964.

In this case a similar conclusion was reached, although the bond did not purport to have been given pursuant to the unconstitutional statute, because it was inferred that the bond would otherwise not have been given. In our own case nothing is left to inference. The sheriff alleges that he "demanded" the bond.

These cases present the exact converse of the principle contended for in the case at bar. There the statute requiring a bond, it will be assumed that the bond would not have been furnished but for the statute, and the statute being unconstitutional, the bond is without consideration. Here the plaintiff demands a bond to which he is not entitled by statute, and it will be inferred, therefore, that but for the demand, the bond would not have been given, and it was therefore extorted under color of office.

II.

The Bond Having Been Exacted and Given as One of Indemnity, the Sheriff, in Default of an Allegation That He Has Paid the Judgment, Brought the Action Prematurely.

The bond itself is designated as one of indemnity (page 21). The condition of the bond provides that the surety "shall well and truly indemnify and save harmless". There is no suggestion of anything in the bond requiring the surety to pay anything to the obligee except as that may be necessary to "indemnify" him.

While it is true that the bond provides for indemnity against liability as well as loss, yet the obligation being to indemnify against a liability, and not to pay the same, the contract is not one to pay against liability, but of indemnity against loss by reason of such liability. This principle is made plain by the reasoning in American Co. v. Fordyce, 36 S. W. Rep. (Ark.) 1051.

In that case the plaintiff was allowed to recover because there was a covenant to discharge all liabilities. The Court said:

> "This is not simply a contract of indemnity. It is more; it is also a contract to pay liabilities. The difference between a contract of indemnity and one *to pay* legal liabilities is that upon the former an action cannot be brought, and a recovery had, until the liability is discharged; whereas upon the latter, the cause of action is complete when the liability attaches."

This distinction between an agreement to pay, and one to indemnify against liability, is also made plain by a series of decisions rendered in the Supreme Court of the United States.

In Mills v. Dow, 103 U. S. 423, there was a taking over of certain contracts, accompanied by an agreement to save the plaintiff harmless from liability thereon. And the Court says:

> "By the instrument in question, the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it, including the sub-contracts and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage *arising out of his liability,* but is an agreement to *assume his contracts* and to discharge him from his liability."

In Johnson v. Risk, 137 U. S. 300, the question arose upon a dissolution of two partnerships, one of the partners buying the other's interest, and *agreeing to assume the payment* of the debts of each

firm, and to protect and keep the other harmless from the payment of any part thereof. As to this, the Court said:

> "It was not an agreement merely to indemnify Johnson from damage, but to assume the indebtedness and discharge him from liability."

Both of these cases refer to that of Wicker v. Hoppock, 73 U. S. 94, where Mr. Justice Swayne in the opinion of the Court points out the true distinction:

> "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases, the obligee cannot recover until he has been actually damnified. He can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well settled distinction between *an agreement to indemnify and an agreement to pay.* In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid.

In the case at bar there is no pretense of an agreement to pay. There is nothing but an agreement to indemnify against loss or liability. And as stated by the Supreme Court, there being no agreement to pay, the agreement to indemnify against liability must be construed to mean indemnity from damage arising out of liability.

That in view of the principle that the obligation of a surety is *stricti juris,* it must not be enlarged by mere construction, is evident from the strong case of Taylor v. Coon, 48 N. W. Rep. (Wis.) 123,

where in a contract of indemnity in which it was provided that the surety would "upon the demand " of anyone or more of said stockholders who shall " be called upon as indorsers to pay such paper, " contribute towards the payment thereof, such sum " as such party ought to contribute in proportion to " the stock held by him", it was held that the complaint, which failed to state that the plaintiff had paid the sum that he was called upon to contribute, was bad on demurrer, for failure to allege that payment had been made. And yet the very stipulation of the bond had materialized, viz., that the stockholders had been called upon to make payment.

The same principle was announced in the case of Thompson v. Taylor, 30 Wis. 68, although there was an express indemnity against liability.

There is in the bond under consideration, a covenant of indemnity against loss and liability, but there is no pretense of a convenant "to assume or pay or discharge from liability".

See also:

Henderson v. Shillito, 60 N. E. Rep. (Oh.) 295;

Central Co. v. Louisville Co., 100 Fed. 545;

Weller v. Eames, 15 Minn. 376.

In that case the bond given was to indemnify against "legal liability", and it was urged that it was an undertaking to prevent liability accruing against the obligee, or to discharge and acquit him from it if it had already accrued. But the Court

held it an indemnity only against actual damage, and that a judgment recovered against the obligee but not paid did not actually damage.

The exact question is also determined in the case of Gilbert v. Wiman, 1 N. Y. 550. In that case the bond read:

"The condition of this obligation is such, that " whereas the said Luce has been appointed to the " office of Deputy Sheriff by the above named Gil- " bert, Sheriff as aforesaid.

"Now, therefore, if the said Luce shall so demean " himself in all matters touching his duty as such " Deputy Sheriff, that the said Sheriff shall not sus- " tain any damage or molestation whatsoever by rea- " son of any act from this date done, *or any liability* " *incurred* by and through said deputy, then this " obligation to be void."

Judgment was recovered against the plaintiff for the act of his deputy, and it was held that the plaintiff could not recover the amount of same without proving that he had paid it.

> "The distinction between the bond in question, and those above mentioned, consists, I apprehend, in this, that by the former, a charge or fixed legal liability is declared to be the injury from which the obligee is to be saved harmless. By the condition of the latter, the obligor stipulates that the Sheriff shall not sustain any damage or molestation by reason of any liability, etc. By the former he is to be saved from the thing specified; by the latter from its consequences, or in other words, from the damage or molestation which may result from the liability. The distinction is very important. It is rec-

> ognized in the cases to which reference has been made, and in others, and will be found to pervade most of the authorities which have been cited. It is the distinction between *an affirmative covenant for a specific thing,* and one of *indemnity against damage by reason of the non-performance* of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different."

The same distinction between indemnity against liability, and an agreement to pay the same, is distinctly pointed out in Belloni v. Freeborn, 63 N. Y. 382:

> "Had this bond been conditioned solely to indemnify and save harmless from damages by reason of the liability of the obligee, the recovery would necessarily have been limited to the actual damages sustained by him. He could only have recovered to the amount of actual damnification. When the bond, as in this case, is conditioned as well to pay the debt or sum specified as to indemnify and save harmless the obligee against his liability to pay the same, the obligee may recover the entire debt or demand upon default in the payment, without having paid anything."

There is in the case at bar an indemnity against liability, but there is lacking the essential condition "to pay the debt". The obligee, therefore, cannot recover because he alleges that he has not discharged the obligation, out of which his liability arose.

> "The tendency of the more modern authorities is to adopt as the cardinal principle to be applied in the construction of such bonds (of indemnity) that actual compensation can only

> be given for loss actually sustained, unless it is evident that the parties have stipulated for some other and more extensive remuneration; and to give more weight to the general purpose of the bond as indicated by its provisions as a whole, and the interests of the parties in the subject matter, than to the precise form of words used in the particular clause".
>
> Am. Ass. v. Waleen, 53 N. W. Rep. (Minn.) 867.

That was a case where the Court refused to follow the letter of the bond, only because the plaintiff had not in fact incurred any damage. Here, too, it may be that the plaintiff in error is wholly irresponsible, or indeed may never be called upon to pay the judgment. This is no idle suggestion, because in the opinion of the Supreme Court confirming the judgment against the sheriff, Cowden v. Finney, 75 Pac. Rep. 765, collusion is expressly insinuated. The Court says:

> "There are some things connected with this purchase on the part of the appellant which do not entirely satisfy us of the fairness of the transaction, and if the evidence as presented in the record were before us in the first instance for our consideration, we might find differently".

III.

To resume. The complaint alleging that the Affidavit and Notice served upon him were "duly filed as required by the Statutes of the State of Idaho", and the Supreme Court of that State having held in the Blumauer case, *supra,* that when these

papers are placed in the hands of the Sheriff "and " they are fair upon their face, he must proceed to " execute them in the manner pointed out in the " Statute. The law requires it, and the Sheriff " has no alternative"; and the complaint alleging that notwithstanding this, the bond was furnished "upon demand" of the Sheriff, the same was extorted by virtue of the office, was without consideration, and void.

And the bond providing only for indemnity against liability, and containing no agreement to pay or discharge same, is a bond of indemnity, and not one for payment, and the complaint alleging that the judgment obtained against the Sheriff "remains unsatisfied and unpaid", the plaintiff cannot recover.

Dated August 17, 1906.

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